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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 262.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM McGLINN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED SEPTEMBER 14, 1882.

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SUPREME COURT OF THE UNITED STATES.

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DD & DETWEILER, PRINTERS, WASHINGTON.

1 Be it remembered that on the 24th day of February, A. D. 1882, there was filed in the office of the clerk of the supreme court of the State of Kansas a certified copy of the pleadings and record in said cause from the district court of Leavenworth county, Kansas, which is in words and figures as follows, to wit:

EXHIBIT A.

Bill of Particulars.

THE STATE OF KANSAS, } ss:
Leavenworth County, }

WILLIAM MCGLINN
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Before O. R. McNary, J. P., Leavenworth county.

1. Plaintiff alleges that on or about 10th day of February, A. D. 1881, the defendant was a railroad corporation doing business as such in the county of Leavenworth, and State of Kansas; that on said day the plaintiff was the owner of a cow of the value of twenty-five dollars; that on said day said cow was killed by the engine and cars of said defendant.

2. That demand for payment of the value of said cow was duly made more than thirty days prior to the filing of this bill of particulars, — the defendant and its ticket and station agents at Leavenworth, Kansas, and payment has been and is still refused.

3. That a reasonable attorney's fee for the prosecution of this suit is twenty dollars in this court.

4. That the road of said defendant, at the place where said cow was killed, was not enclosed by a good and lawful fence to prevent such animals from being on said road.

Wherefore plaintiff prays judgment for the sum of forty-five dollars.

THOMAS P. FENLON,
Att'y for Pl'ff.

Issue summons and set case for Saturday, at 1 o'clock p. m., and issue subpœna for J. C. Hall (engineer).

THOMAS P. FENLON,
Att'y for Pl'ff.

Endorsed: 1052. William McGlinn *vs.* Chicago, Rock Island & Pacific Railway Company. No. 1895. Bill of particulars. Filed October 22, 1881. McCown Hunt, clerk, by Chas. Crouse, D. C. Filed August 23rd, 1881. O. R. McNary, J. P. Fenlon.

2 STATE OF KANSAS, } ss:
Leavenworth County, }

In the District Court of said Leavenworth County.

WILLIAM MCGLINN, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

It is hereby agreed that the above-entitled cause shall be submitted to the court upon the following statement of facts, upon which the court may render judgment as upon a finding upon a particular question of fact.

On or about the 10th day of February, 1881, a cow, the property of the plaintiff, of the value of twenty-five dollars, strayed upon the railroad of the defendant at a point within the limits of the Fort Leavenworth military reservation, in said county and State, where said road was not enclosed with a fence, and was then and there, within the limits of said reservation, struck and killed by a train passing along said railroad belonging to said defendant. Said Fort Leavenworth military reservation is the same reservation referred to in an act of the Legislature of Kansas entitled an act to cede jurisdiction to the United States over the territory of the Fort Leavenworth military reservation, approved February 22, 1875.

Demand for said sum of twenty-five dollars was made by plaintiff of said defendant more than thirty days before this suit was brought, and payment refused, and if said plaintiff is entitled to recover attorney's fees, twenty dollars would be a reasonable fee in this case.

THOMAS P. FENLON,
Att'y for Pl'ff.
M. A. LOW, J. D. SHAFER,
Attorneys for Defendant.

Endorsed: 8195. William McGlinn *vs.* C., R. I. & P. R'l'y Co. Copy. Stipulations. Filed December 21st, 1881. McCown Hunt, clerk, by Chas. Crouse, D. C.

STATE OF KANSAS, } ss:
Leavenworth County, }

In the District Court in the County of Leavenworth, in the State of Kansas.

Motion for a New Trial.

WILLIAM MCGLINN, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

And now comes the above-named defendant and moves the court to vacate and set aside the decision of the court heretofore rendered and made herein and grant a new trial of this action for the follow-

ing causes, affecting material- the substantial rights of the said defendant:

First. For and because of irregularity in the proceedings of the court by which defendant was prevented from having a fair trial.

3 Second. For that the decision is not sustained by sufficient evidence.

Third. For that the decision is contrary to law.

Fourth. For and because of error of law occurring at the trial and excepted to by the said defendant.

M. A. LOW AND
J. D. SHAFER,
Attorneys for Defendant.

No. 8195. McGlinn *vs.* C., R. I. & P. R. R. Co. Motion for a new trial. Filed January 28, 1882. McCown Hunt, clerk.

UNITED STATES OF AMERICA:

Be it remembered that at the December term, A. D. 1881, of the district court of the first judicial district of the State of Kansas, sitting within and for the county of Leavenworth, in said State, begun and held in the city of Leavenworth, commencing on Monday, the 5th day of December, A. D. 1881—present: The Honorable Robert Crozier, judge; John W. Prest, sheriff of Leavenworth county, Kansas, and McCown Hunt, clerk—the following proceedings were had, to wit:

SATURDAY, *January 28th, A. D.* 1882.

Court met pursuant to adjournment.

Present: As before.

WILLIAM McGLINN, Plaintiff,
against
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant. } No. 8195.

This day came the plaintiff herein, by Thomas P. Fenlon, his attorney, and also came the defendant, by M. A. Low and J. D. Shafer, its attorneys; and thereupon this cause came on to be heard, upon the agreed statement of facts filed herein, which is in the words and figures following, to wit:

STATE OF KANSAS, } ss:
Leavenworth County, }

In the District Court of said Leavenworth County.

WILLIAM McGLINN, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

It is hereby agreed that the above-entitled cause shall be submitted to the court upon the following statement of facts, upon which the

court may render judgment, as upon a finding upon a particular question of fact:

On or about the 10th day of February, 1881, a cow, the property of plaintiff, of the value of twenty-five dollars, strayed upon the railroad of the defendant, at a point within the limits of the Fort Leavenworth military reservation, in said county and State, where said road was not enclosed with a fence, and was then and there, and within the limits of said reservation, struck and killed by a train passing along said railroad belonging to said defendant. Said Fort Leavenworth military reservation is the same reservation referred to in an act of the Legislature of Kansas entitled an act to cede jurisdiction to the United States over the territory of the Fort Leaven-
4 worth military reservation, approved February 22, 1875.

Demand for said sum of twenty-five dollars was made by plaintiff of said defendant more than thirty days before this suit was brought, and payment refused, and if said plaintiff is entitled to recover attorney's fees, twenty dollars would be a reasonable fee in this case.

THOMAS P. FENLON,
Att'y for Pl'ff.
M. A. LOW,
J. D. SHAFER,
Attorneys for Defendant.

Which was all the testimony offered or read. And the court, having heard the argument of counsel thereon, and having duly considered the same, now finds for the plaintiff herein, and assesses his damages against said defendant at the sum of forty-five dollars ($45.00).

To which finding and decision of the court said defendant excepted and filed its motion for a new trial hereof, which motion, with the consent of the parties, came on for hearing, and the court, having heard the argument of counsel thereon, and having duly considered the same, now overrules said motion. To which ruling and decision of the court said defendant excepted.

It is, therefore, now by the court here considered, ordered, and adjudged that said plaintiff, William McGlinn, have and recover of and from said defendant, The Chicago, Rock Island and Pacific Railway Company, the sum of forty-five dollars ($45.00), with interest thereon from this time until paid, at the rate of seven (7) per cent. per annum, and all his costs herein expended, and that execution issue therefor.

To which judgment and decision of the court said defendant excepted; and, for good and sufficient cause to the court shown, it is ordered that leave be, and the same is, given said defendant to make its case herein for the supreme court of the State of Kansas, and to serve the same upon said plaintiff or his attorney within thirty (30) days from this time, and its time in which so to do is hereby so enlarged and extended.

STATE OF KANSAS, } ss:
Leavenworth County, }

I, McCown Hunt, clerk of the district court of the first judicial district of the State of Kansas, sitting within and for the county aforesaid, do hereby certify that the above and foregoing to be true, full, and complete copies of all the pleadings, stipulation of facts, motion for a new trial, and journal entries in the therein-entitled cause as the same remains on file of record in my office.

Witness my hand and the seal of said court, affixed at my office, in the city of Leavenworth, this the 15th day of February, A. D. 1882.

[SEAL.] McCOWN HUNT, *Clerk*,
By CHAS. GROUSE,
Deputy Clerk.

Endorsed: No. 8195. District court, Leavenworth county, Kansas. William McGlinn *vs.* C., R. I. & P. R. Co. Transcript. Fees of transcript, paid by J. D. Shafer for defendant, $1.00.

No. 2532. Chicago, Rock Island and Pacific Railway Co. *vs.* William McGlinn. Petition in error and transcript. Filed February 24th, 1882. C. J. Brown, clerk supreme court.

5 And also, on, to wit, the 24th day of February, A. D. 1882, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in error and waiver of the issuance and service of a summons in error; which said petition in error and waiver of summons are in the words and figures as follows, to wit:

Petition in Error.

In the Supreme Court for the State of Kansas.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
WILLIAM McGLINN, Defendant in Error.

The Chicago, Rock Island and Pacific Railway Company, the above-named plaintiff in error, complains of the said William McGlinn, the defendant in error, for that said defendant in error, at the December term, A. D. 1881, of the district court in the county of Leavenworth, in the State of Kansas, and on the 28th day of January, A. D. 1882, during said term, recovered judgment against said plaintiff in error in a certain action then pending in said court, wherein said defendant in error was plaintiff and this plaintiff in error was defendant. A copy of the pleadings, stipulation of facts, motion for a new trial, and record of judgment and proceedings in which case duly certified is hereto attached, marked Exhibit "A," and made a part of this petition.

And the said plaintiff in error avers and alleges that there is error in said record and proceedings in this, to wit:

First. That said court erred in rendering judgment as it did in

favor of said William McGlinn, when it should have rendered judgment in favor of this plaintiff in error.

Second. That said court erred in allowing the attorney's fees of twenty dollars under the agreed statement of facts.

Third. That said court erred in allowing said William McGlinn twenty-five dollars damages for the cow under said agreed statement of facts.

Wherefore said plaintiff in error prays that said judgment may be reversed and judgment rendered herein in favor of this plaintiff in error for costs of suit, &c.

M. A. LOW AND
J. D. SHAFER,
Attorneys for Plaintiff in Error.

I hereby waive the issuing and service of summons in error in the above-entitled case and enter my appearance herein and consent that the same may be docketed for hearing.

February 15, 1882. THOS. P. FENLON,
Attorney for Defendant in Error.

Filed Feb. 24, 1882. C. J. BROWN,
Clerk Supreme Court.

6 And afterwards, to wit, on Thursday, the eighth day of June, A. D. 1882, the same being one of the regular judicial days of the January term, A. D. 1882, of the supreme court of the State of Kansas, before said court, in session at the supreme court-room in the city of Topeka—present: Hon. Albert H. Horton, chief justice; Hon. Daniel M. Valentine and Hon. David J. Brewer, associate justice, and C. J. Brown, clerk of said court—the following proceedings, among others, was had and entered of record on page 166 of Journal I as follows, to wit:

C., R. I. & P. R'L'Y. Co., Pl'ff in Error,
vs.
WILLIAM MCGLINN, Def't in Error.

This cause came on to be heard on petition in error and transcript of the record of the district court of Leavenworth county, and after argument by Thomas P. Fenlon, counsel for defendant in error, was submitted on briefs of counsel for both parties and taken under advisement by the court.

And also on, to wit, on Thursday, July sixth, A. D. 1882, the same being one of the regular judicial days of the July term, A. D. 1882, of the supreme court of the State of Kansas, before said court, in session at the supreme court-room in the city of Topeka—present: Hon. Albert H. Horton, chief justice; Hon. Daniel M. Valentine and Hon. David J. Brewer, associate justices, and C. J. Brown, clerk of said court—the following proceedings, among others, was had and entered of record on page 186 of Journal I as follows, to wit:

C., R. I. & P. R'L'Y Co., Plaintiff in Error,
vs.
WILLIAM McGLINN, Defendant in Error.

This cause came on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be affirmed, with costs, and hereof let execution issue.

Horton, C. J., delivered the opinion of the court.

All the justices concurring.

7 And also on, to wit, on Thursday, the sixth day of July, A. D. 1882, the same being one of the regular judicial days of the July term, A. D. 1882, of the supreme court of the State of Kansas, there was filed in the office of the clerk of the said court the syllabus and opinion of the court in said cause, a copy of each of said syllabus and opinion is hereunto annexed, which are in words and figures as follows, to wit:

8 *Syllabus.*

THE CHICAGO, ROCK ISLAND AND PACIFIC R'L'Y CO. } 2532.
vs.
WILLIAM McGLINN.

Error from Leavenworth county. Affirmed.

By the court, HORTON, C. J.:

Conceding, for the purposes of this case, that the act of February 22, 1875, entitled "An act to cede jurisdiction to the United States over the territory of the Fort Leavenworth military reservation," is valid, and conceding that the United States has legally accepted the grant, the statute of February 27, 1874, entitled "An act relating to killing or wounding stock by railroads," continues to be operative within the limits of the reservation, as the act has not been abrogated by Congress and is not inconsistent with the existing laws of the United States.

All the justices concurring.

8½ *Statement.*

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY
vs.
WILLIAM McGLINN.

Action brought by William McGlinn against the Chicago, Rock Island & Pacific Railway Co. to recover the value of a cow which strayed upon defendant's railroad within the limits of the Fort Leavenworth military reservation. The case arose under the stock law of 1874, making railroad corporations liable for stock killed on roads not enclosed with a good and lawful fence to prevent such animals from being on the road. Trial had at the December term, 1881, of the court, and the case was submitted upon the following agreed statement of facts:

"On or about the 10th day of February, 1881, a cow, the property of plaintiffs, of the value of twenty-five dollars, strayed upon the railroad of the defendant at a point within the limits of the Ft. Leavenworth military reservation, in said county and State, where said road was not inclosed with a fence, and was then and there, and within the limits of said reservation, struck and killed by a train passing along said railroad belonging to said defendant. Said Ft. Leavenworth military reservation is the said reservation referred to in an act of the Legislature of Kansas, entitled "An act to cede jurisdiction to the United States over the territory of the Fort Leavenworth military reservation," approved February 22, 1875.

Demand for said sum of twenty-five dollars was made by plaintiff of said defendant more than thirty days before this suit was brought, and payment refused: and if said plaintiff is entitled to recover attorney's fees, twenty dollars would be a reasonable fee in this case.

THOMAS P. FENLON,
Att'y for Pl'ff.
M. A. LOW,
J. D. SHAFER,
Att'ys for Def'ts."

The court, upon consideration, rendered judgment for forty-five dollars. The defendant filed a motion to set aside the judgment, which was overruled, and now brings the case here.

9 THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY
vs.
WILLIAM MCGLINN.

The opinion of the court was delivered by HORTON, C. J.:

The question presented for our consideration is whether the statute of 1874, entitled "An act relating to killing or wounding stock by railroads," is operative within the limits of the United States military reservation known as the Ft. Leavenworth reservation. By an act of the Legislature of our State of February 22, 1875, it was provided:

"That exclusive jurisdiction be, and the same is hereby, conceded to the United States over and within all the territory owned by the United States and included within the limits of the United States military reservation known as the Fort Leavenworth reservation, in said State, and declared from time to time by the President of the United States, saving, however, to the said State the right to serve civil or criminal process within said reservation, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said State, but outside of said cession and reservation; and saving further to said State the right to tax railroad, bridge, and other corporations, their franchises and property, on said reservation."

Counsel for plaintiff in error (defendant below) claim that since the enactment of this statute the laws of the State have had no

more force within the territory attempted to be ceded thereby than they have in Missouri or Maine, and that the rights and liabilities of parties for acts done within this territory since the alleged cession of jurisdiction must be determined, not by the laws of Kansas, but of the United States.

On the part of the defendant in error (plaintiff below) it is urged that the act of 1875, ceding jurisdiction of the Ft. Leavenworth reservation to the United States, is void, on the ground that there is no power vested in the Legislature of Kansas to cede away any of the sovereign political rights of the State, and that the constitution of the State grants no power to its Legislature to divest the State of any part of its governmental authority over any portion of the soil included within its boundaries when admitted into the Union. It is further claimed that, although the 8th section of the first art. of the Federal Constitution
10 gives Congress the exclusive right of legislation "over all places purchased by the consent of the Legislature of the State * * * for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." That it cannot be asserted the Legislature of Kansas ever consented to the purchase by the Federal Government of the Ft. Leavenworth military reservation. Further, it is contended that if the power does exist in the Kansas Legislature to cede jurisdiction of a portion of its Territory to the United States, it cannot compel the Federal Government to accept such grant, and in the absence of any evidence tending to show an acceptance of the grant by the United States, no presumption exists that the Government has ever accepted the grant. It is finally contended that as the act of February 27, 1874, applied to the Ft. Leavenworth reservation prior to the claimed cession of jurisdiction to the United States by the act of February 22, 1875, that the act of 1874 is operative and of full force over the ceded territory as such act has not been modified or repealed by any law of the United States, and is not inconsistent or in conflict with the provisions of any existing law of the United States. As steps are being taken to obtain the opinion of the Supreme Court of the United States upon the validity and interpretation of the act of February 22, 1875, by the prosecution of proceedings in error from the judgment of this court lately rendered in the case of the Fort Leavenworth Railroad Company *vs.* Lowe, 27 Kas.,—. We content ourselves with deciding the matter before us upon the last proposition made by counsel representing defendant in error.

It is the rule, as we understand it, that all laws and municipal regulations in force at the time any territory is ceded by one power to another power of jurisdiction remain in force until changed
11 by the new sovereign authority, unless such laws and regulations are inconsistent or in conflict with the existing laws of the new power taking possession of the ceded territory. It follows from this, that even conceding the validity of the act of February 22, 1875, ceding to the United States the Ft. Leavenworth reservation, and conceding that the United States has legally accepted the grant, the act of 1874 is operative over the reservation, because

such act has not been abrogated by Congress, nor is it inconsistent with any legislation of that body. Cass *v.* Dillon, 2 Oh. St., 607; United States *v.* Heirs, 11 H., 570; see the Ft. Leavenworth R. R. Co. *v* Lowe, *supra.*

The judgment of the district court will be affirmed. All the justices concurring.

12 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, and also in the rendition of judgment, of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between The Chicago, Rock Island and Pacific Railway Company, plaintiff in error, and William McGlinn, wherein was drawn in question the validity of a statute of said State, on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of its validity; and wherein an immunity was claimed under the Constitution of the United States and the decision was against the immunity specially set up or claimed, a manifest error hath happened to the great damage of the said Chicago, Rock Island and Pacific Railway Company, as by complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and specific justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distictly and openly, you send the record and proceedings aforesaid, with all things concernings the same, to the Supreme Court of the United States, together with the writ, so that you can have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record of proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 13th day of July, in
13 the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] A. S. THOMAS,
Clerk of the Circuit Court of the United States
for the District of Kansas.

Allowed by—
ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

Fee for issuance this writ, one dollar. Paid by J. D. Shafer, attorney for plaintiff in error. A. S. Thomas, clerk.

2532. C., R. I. & P. R. R. Co. *vs.* William McGlinn. Writ of error. Filed July 15, 1882. C. J. Brown, clerk supreme court.

14 Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Appellant,
vs.
WILLIAM MCGLINN, Appellee.

Know all men by the presents, that we, The Chicago, Rock Island and Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, and Harvey L. Bickford, of Leavenworth city, State of Kansas, are held and firmly bound unto William McGlinn, of Leavenworth, Kansas, in the sum of two hundred dollars, to be paid to the said William McGlinn, his executors and administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, and successors, firmly by these presents.

Sealed with our seals. Dated this 13th day of July, 1882.

Whereas the above named The Chicago, Rock Island and Pacific Railway Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the supreme court of the State of Kansas:

Now, therefore, the condition of this obligation is such, that if the above named The Chicago, Rock Island and Pacific Railway Company shall prosecute its said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

[SEAL.] THE CHICAGO, ROCK ISLAND, AND
PACIFIC RAILWAY COMPANY,
By HUGH RIDDLE, *President.*

Attest: C. F. JILSON, *Ass't Sec'y.*

HARVEY L. BICKFORD.

Approved by—
ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

Endorsed: 2532. C., R. I. & P. R. R. Co. *vs.* William McGlinn. Bond. Filed July 15, 1882. C. J. Brown, clerk supreme court.

15 UNITED STATES OF AMERICA, *ss:*

To William McGlinn, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Kansas, wherein the Chicago, Rock Island and Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. H. Horton, chief justice of the said supreme court of Kansas, the 13th day of July, in the year of our Lord one thousand eight hundred and eighty-two.

ALBERT H. HORTON,
Chief Justice Supreme Court State of Kansas.

Service of the above and foregoing citation is hereby acknowledged and accepted this 15th day of July, 1882, by the delivery of a duplicate of the same to me.

THOS. P. FENLON,
Attorney for Defendant in Error, William McGlinn.

Endorsed: 2532. C., R. I. & P. R. R. Co. *vs.* William McGlinn. Citation. Filed July 17, 1882. C. J. Brown, clerk Supreme Court.

16 THE STATE OF KANSAS, } ss:
Supreme Court. }

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a true and complete copy of the pleadings, of the record of proceedings had, of the judgment rendered, of the syllabus and opinion, of the writ of error, bond, and citation filed in the above cause as the same remain of record and on file in my office.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the supreme court of the State of Kansas, at my office, in Topeka, Kansas, this fifth day of September, A. D. 1882.

[SEAL.] C. J. BROWN,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: Kansas sup. court. No. 262. The Chicago, Rock Island & Pacific Railway Company, plaintiff in error, *vs.* William McGlinn. Filed 14 September, 1882.

114-5-42

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM McGLINN,
Defendant in Error.

No. 262.
In error to the Supreme Court of the State of Kansas.

Statement and Brief for Plaintiff in Error.

THOS. F. WITHROW,
M. A. LOW,
FOR PLAINTIFF IN ERROR.

TRENTON:
Republican Steam Book and Job Rooms.
1884.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM McGLINN,
Defendant in Error.

No. 262.
In error to the Supreme Court of the State of Kansas.

Statement and Brief for Plaintiff in Error.

STATEMENT.

This was an action to recover the v[illegible] cow killed on defendant's railroad within the [illegible]s of the Fort Leavenworth military reservation in the state of Kansas. The case was submitted to the District court of Leavenworth county, Kansas, upon the following agreed statements:

It is hereby agreed that the above entitled cause shall

be submitted to the court upon the following statement of facts, upon which the court may render judgment as upon a finding upon a particular question of fact:

On or about the 10th day of February, 1881, a cow, the property of plaintiff, of the value of twenty-five dollars, strayed upon the railroad of the defendant at a point within the limits of the Fort Leavenworth military reservation, in said county and state, where said road was not inclosed with a fence, and was, then and there, within the limits of said reservation, struck and killed by a train passing along said railroad, belonging to said defendant. Said Fort Leavenworth military reservation is the same reservation referred to in an act of the legislature of Kansas, entitled an act to cede jurisdiction to the United States over the territory of the Fort Leavenworth military reservation, approved February 22, 1875.

Demand for said sum of twenty-five dollars was made by plaintiff of said defendant more than thirty days before this suit was brought, and payment refused; and, if plaintiff is entitled to recover attorney's fees, twenty-five dollars will be a reasonable fee in this case. [1]

And thereupon the District court rendered judgment for plaintiff in the sum of forty-five dollars. [2] The defendant then took the case to the Supreme court of the state of Kansas by petition in error, where the judgment of the District court was affirmed. [3]

This action was founded upon the following sections of the statutes of the state of Kansas:

(4915) §30. Sec. 1. Every railway company or corporation in this state, and every assignee or lessee of such company or corporation, shall be liable to pay the owner the full value of each, any [and] every animal killed, and all damages to each and every animal wounded by the engine or cars on such railway, or in any other manner whatever in operating such railway, irrespective of the fact as to whether such killing or wounding was caused by the negligence of such railway company or corporation, or the assignee or lessee thereof, ornot.

[1] Record, 3, folio, 3.
[2] Record, 4, folio, 4.
[3] Record, 7, folio, 6.

(4916) § 31. Sec. 2. In case such railway or corporation, or the assignee thereof, shall fail for thirty days after demand made therefor by the owner of such animal, or his agent or attorney, to pay such owner or his agent or attorney, the full value of such animal if killed, or damages thereto if wounded, such owner may sue and recover from such railway company or corporation, or the assignee or lessee thereof, the full value of such animal or damages thereto, together with a reasonable attorney's fee for the prosecution of the suit, and all costs in any court of competent jurisdiction in the county in which such animal was killed or wounded.

(4919) § 34. Sec. 5. This act shall not apply to any railway company or corporation, or the assignee or lessee thereof, whose road is inclosed with a good and lawful fence, to prevent such animal from being on such road. [1]

The material portion of the act of the legislature of Kansas ceding jurisdiction over the Fort Leavenworth military reservation is as follows:

Section 1. That exclusive jurisdiction be and the same is hereby ceded to the United States over and within all the territnry owned by the United States, and included within the limits of the United States military reservation known as the Fort Leavenworth reservation, in said state, as declared from time to time by the President of the United States, saving, however, to the said state the right to serve civil or criminal process within said reservation, in suits prosecuted for, or on account of right acquired, obligations incurred, or crimes committed in said state, but outside of said cession and reservation; and saving further, to said state, the right to tax railroad, bridge and other corporations, their franchises and property, on said reservation. [2]

ASSIGNMENT OF ERRORS.

The plaintiff in error says that there is manifest error in the record and proceedings of the court below, in this:

1. That the court rendered judgement for defendant in error on the agreed statement of facts.

2. That said judgment is excessive, in that it includes the sum of twenty-five dollars as an attorney's fee.

3. That the court held that Sections 4915, 4916 and 4919, of the Compiled Laws of Kansas, and each of them,

[1] Compiled Laws of Kansas, 1879, p. 784-5.

[2] Laws of Kansas, 1875, p. 95.

were in force within the limits of the Fort Leavenworth military reservation.

4. That the judgment is contrary to the constitution and laws of the United States, in that no law of the United States requires railroad companies to fence their roads, or imposes any penalty for failing to do so.

5. That the court refused to hold that the act of the legislature of the state of Kansas, entitled an act to cede jurisdiction to the United States over the territory of the Fort Leavenworth military reservation, approved February 22, 1875, vested exclusive jurisdiction over said reservation in the congress of the United States.

6. That the court held that the statutes of the state of Kansas, and not the laws of the United States, were applicable to this action.

7. That the court denied the immunity from liability in this action, claimed by plaintiff in error, under the constitution and laws of the United States.

BRIEF.

Two questions arise on this record: *First*, is the act of the legislature of the state of Kansas purporting to cede to the United States exclusive jurisdiction over the Fort Leavenworth mililary reservation, a valid cession, within the requirements of the constitution of the United States? *Second*, if such cession of jurisdiction was valid, are persons subject to penalties imposed by the local statutes of Kansas, on account of acts done within the limits of the Fort Leavenworth military reservation, or does the liability of persons for such acts depend upon the constitution and laws of the United States?

I.

By the act of February 22, 1875,[1] it was enacted by the legislature of the state of Kansas "That exclusive "jurisdiction be and the same is hereby ceded to the "United States over and within the territory owned by the "United States, and included within the limits of the "United States military reservation, known as the Fort "Leavenworth military reservation."

The validity of this act was drawn in question in *Fort Leavenworth Railroad Company v. Lowe*, now pending in this court,[2] and as that question has been argued, and will, doubtless, be determined in that case, it is not thought necessary to repeat the same argument here.

II.

If congress has exclusive legislative jurisdiction over this territory, it seems to follow that it is subject exclusively to the laws of the United States, the same as other territories, whether organized or not. "The laws of the "United States, framed for such places, become the "law of these places upon the consent of the state "lawfully given for that purpose."[3] It is true that the laws, usages and municipal regulations in force at the time of the conquest or cession of a county, respecting the rights of property, remain in force until the new sovereign manifests [illegible]ry intention. But that rule has no application to

[1] *Ante*, 3; Laws of Kansas, 1875, p. 95.

[2] No. 243.

[3] *Ex parte* Hebard, 4 Dill. 380, 383.

the mere cession of jurisdiction over a small piece of territory having no organized government or municipality within its limits. The ownership of property was not changed or affected by this cession. The very object of this cession was to take the territory from the operation of the laws of the state, and subject it to the laws of the United States, exclusively.

"Where a *country* is acquired by conquest, or even by "cession, no formal act of legislation is necessary to change "the law, but the mere will of the conquerer is to determine "whether the ancient laws shall remain, or shall be changed either wholly or in part." [1]

The will of the United States that this territory should be governed by its own laws, was made manifest by the act of obtaining the cession of jurisdiction for that very purpose. By this cession no sovereignty over this territory was left in the state, or in the people inhabiting the territory. The territory, both as respects its ownership and its laws, was incorporated with and become a part of the territory of the United States. The rule, under such circumstances, is stated by Vattel, as follows:

"This submission may be varied to infinity, according to "the will of the contracting parties; it may either leave the "inferior nation a part of the sovereignty, restraining it "only in certain respects, or it may totally abolish it, so "that the superior nation shall become the sovereign of the "other, or, finally, *the lesser nation may be incorporated "with the greater, in order thenceforward to form with it but "one and the same state; and then the citizens of the former will have the same privileges as those with whom they are united.*" [2] In which case, it is said in a note to §195,

[1] Canal Appraisers v. People, 17 Wend. 569, 584.

[2] Vattel's Law of Nations, Book 1, Chap. XVI, § 194.

citizens of the incorporated territory *"stand in the same predicament with all the other citizens."*

In the act accepting the cession of jurisdiction over the District of Columbia, it was thought necessary to provide, "That the operation of the laws of the state within such "district shall not be affected by this acceptance, until the "time fixed for the removal of the government thereto, "and until Congress shall otherwise by law provide." [1]

"And afterwards, by the act of Feb. 27, 1801, Congress enacted: "That the laws of Virginia, as they now exist, "shall be and continue in force in that part of the District "of Columbia, which was ceded by the said state to the "United States, and by them accepted for the permanent "seat of government; and that the laws of the state of "Maryland, as they now exist, shall be and continue in "force in that part of said District, which was ceded by "that state to the United States, and by them accepted "as aforesaid." [2]

By section 12 of the Revised Statutes relating to the District of Columbia, the laws of Maryland, not inconsistent with the laws of Congress, are continued in force within the District.

These statutes are a clear recognition of the necessity for some legislative action to continue the laws of Maryland and Virginia in force, in the portions of the District of Columbia ceded by these states respectively. But no action has been taken indicating an intention to continue the penal laws of Kansas in force within the limits of the Fort Leavenworth military reservation. Congress has by general laws provided for the government of such territories.

[1] 1 U. S. Stat at Large, 130. [2] 2 U. S. Stat. at Large, 103.

III.

This is an action to recover a penalty [1] given by a statute of the state of Kansas for the non-observance of a mere police regulation. The regulation of the internal police of this reservation does not devolve upon the state of Kansas, and it has no right to impose or enforce penalties for the non-observance of such regulations. Referring to a similar statute, the Supreme court of Illinois recently said: "This provision may be upheld as being in the nature of a penalty for non-compliance with the statutory duty of fencing." [2] "This power is sustained as a part of the police power of the state," said the Supreme court of Kansas, in *K. P. R. Co., v. Mower.* [1]

No duty to fence is imposed by any law of the United States, or of the state of Kansas. "Fencing is not declared a duty; [3] it is only held up as a means of escaping liability." There can be no liability in such cases without fault on the part of the company in some respect. Liability can only follow from the breach of some duty. If the duty to fence was not imposed by the laws of Kansas before this cession, there can be no claim that any such duty now exists, or ever did exist, within the limits of this reservation.

The making and enforcing of police regulations is a matter peculiarly within the province of the sovereign power. The Fort Leavenworth military reservation has been incorporated in the public domain of the United States and is subject to its laws. The United States has assumed

[1] K. P. R'y Co. v. Mower, 16 Kas. 576, 577; Trice v. R. Co., 49 Mo. 438; R. Co. v. McClelland, 25 Ill. 140.

[2] Peoria, &c., R. Co. v. Duggan, 18 Reporter, 358.

[3] 16 Kas. 578.

the duty of punishing crimes committed within its limits, and of regulating its internal police. No penalty can be imposed anywhere for an act done within its borders, which is not given by the laws of the United States, for it, alone, can impose punishment for acts done, or omitted to be done, within the territory subject to its exclusive jurisdiction. No other sovereignty has power to determine that an act done there is culpable, and deserving of punishment. And no punishment can be imposed there, or on account of acts done there, except in pursuance of the laws of the United States.

THOS. F. WITHROW,
M. A. LOW,
For Plaintiff in Error.

[1] 1 Kent. Com. 430, 431.

114-542

FILED
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JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY CO.

vs.

WILLIAM McGLINN.

No. 262.

W. HALLETT PHILLIPS,
For Defendant in Error.

E. O. POLKINHORN & SON, PRINTERS.

IN THE

Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY CO.

vs.

WILLIAM MCGLINN.

No. 262.

Brief of W. Hallett Phillips for Defendant in Error.

The general question involved in this case, is as to the operation of the State laws within the Fort Leavenworth military reservation, in the State of Kansas.

The particular law sought to be applied is the act of 1874, entitled "An act relating to killing or wounding stock by railroads."

It is found in the compiled laws of Kansas, 1879, 784–5.

The act makes railway companies liable to the owners for the killing or damage to cattle, together with counsel fees for bringing suit, but provides that the act shall not apply to any railway company whose road is enclosed with a good and lawful fence, to prevent the animals from being on the road

The present action was brought in the State court by McGlinn to recover for the loss of a cow run over by defendant's cars.

The case was submitted to the court under an agreed statement of facts.

In this, the ownership and loss of the cow, as alleged, was admitted, and the further fact was admitted that the loss happened within the limits of the military reservation, at a place where the road was not enclosed with a fence. Rec. 2.

Under the submission there was a judgment for the plaintiff, which, on appeal by the defendant, was affirmed by the Supreme Court of Kansas. The defendant then brought the case here.

It is claimed by the company that the judgment should be reversed, because the court held, that the law of Kansas, above referred to, was in force within the limits of the Fort Leavenworth military reservation, and, further, that the judgment is erroneous because no law of the United States requires railway companies to fence their roads within the reservation—

> "Why should we in the compass of a pale,
> Keep law and form?"

The Supreme Court of Kansas say:

> "It is the rule, as we understand it, that all laws and municipal regulations in force at the time any territory is ceded by one power to another power, of jurisdiction, remain in

> force until changed by the new sovereign authority, unless such laws and regulations are inconsistent or in conflict with the existing laws of the new power taking possession of the ceded territory. It follows from this, that even conceding the validity of the act of February 22, 1875, ceding to the United States the Fort Leavenworth military reservation, and conceding that the United States has legally accepted the grant, the act of 1874 is operative over the reservation, because such act has not been abrogated by Congress, nor is it inconsistent with any legislation of that body." Rec. 9.

This was all that was decided by that court, and we submit that the decision was plainly right.

The general principle announced is not denied by plaintiff in error, but it is urged that "it has no application to the mere cession of jurisdiction over a small piece of territory having no organized government or municipality within its limits; that the very object of the cession was to take the territory from the operation of the laws of the State, and subject it to the laws of the United States exclusively." (Brief, p. 6.)

It is difficult to perceive what distinction as to the rights of the inhabitants can be drawn between a case where *territory* is ceded and that where *jurisdiction alone* is ceded.

In the first case, the cession of the land, if made by a foreign power, carries the jurisdiction with it. If the cession be made under the constitution by

one of the United States, or if the land is purchased by the United States with the consent of the State, the jurisdiction likewise passes.

In either event the question would still remain, do not the State laws, not conflicting with the laws of the national Government, still apply after the cession, as to the rights and obligations of the inhabitants of the territory over which jurisdiction is ceded?

In the case of Fort Leavenworth Railroad *vs.* Lowe, which has been argued, the question was, whether the State of Kansas preserved the right to tax corporate property situated within the reservation, by virtue of the clause in the act of cession retaining the power of taxation.

As was shown in that case, the reservation was set apart by the United States for military purposes long prior to the period of the admission of Kansas as a State.

The act of admission, however, having included the reservation within the boundaries of the new State, it was necessary, in order for the United States to acquire exclusive jurisdiction over the territory, to obtain the consent of the State.

That consent was given by the act of 1875, on the conditions that the State process should still run into the territory, and that the right of taxation above adverted to should be retained.

It is claimed that the judgment below is a violation of Article 1 Section 8 of the Constitution. This gives Congress power—

> "To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

We will treat the case as if there had been a purchase by the United States of the land included within the reservation. This was the position taken by the Supreme Court of Kansas.

We submit, that under the facts established, the application of the Kansas act of 1874 within the reservation, in no wise infringed upon the power of exclusive jurisdiction possessed by Congress under the Constitution.

That act was in force when the cession took place, and was not abolished as to the reservation by the mere fact of the cession.

The act of 1874 was a statutory regulation of the general law of negligence as applied to the liability of railrads.

No objection is made to the law itself, but merely to its application.

The statute in effect says, that the railroad is bound to maintain fences, as against the owner of the cattle, and if they come upon the road through defect of such fences, and are injured, the company

shall be liable without further proof of negligence. (1 Red. Rail., 487.)

As the United States have no common law, unless the State law is applicable, neither the citizens of the State residing outside of the reservation, nor the persons employed in the service of the Government residing upon the reservation can hold the company liable for negligence, or hold them liable upon any other ground.

No distinction can be sound which rejects one law of the State and applies another within the reservation.

The only test can be, whether the particular law comes in conflict with any law or regulation of the United States, or is repugnant to the purposes for which the reservation is held and used.

There are no general laws of the United States governing public reservations.

Until Congress acts, the State laws remain in force.

We do not understand it to be denied that Congress could continue in force the laws of the State within the reservation.

But it is said no such action has been taken.

It is mentioned that Congress deemed it necessary to provide, on the acquisition of the District of Columbia, that the laws of Virginia and Maryland should continue in force in the portions of the District ceded by the respective States. (2 Stat., 103.)

This law only recognized and confirmed the terms upon which the cessions were made.

By the fourth clause of the cession by Virginia, it is provided "that the jurisdiction of the laws of this commonwealth over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine until Congress having accepted the said cession shall by law provide for the government thereof under their jurisdiction in manner provided by the article of the Constitution before recited." (Va., Act 3, December, 1789.) 13. Hen. Stat. 43

In an opinion of this court, delivered through Chief Justice Marshall, it is said—

> "Under the terms of the cession and acceptance of the district, the power of legislation remained in Virginia until it was exercised by Congress."
>
> Young *vs.* Bank of Alexandria, 4 Cr. 397.

And Maryland, in the act ratifying her cession, provided that the laws of the State should remain in force until changed by Congress. (2 Kilty, Laws Md., Ch. 45.)

Speaking of this portion of the act, Chief Justice Taney used the following language:

> "The United States accepted the cession made by this law of the State; and the conditions above recited, therefore, formed a part of the contract between the parties; and consequently the laws of Maryland, and the jurisdiction of